

Final Report

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Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC

Prepared for the FCC as a deliverable under the contract "Estimation of Utilization Rates/Probabilities of Obtaining Broadcast Licenses from the Federal Communications Commission or of Obtaining Broadcast and Wireless Licenses through Secondary Market Transactions"

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I. Introduction

KPMG LLP has prepared this report for the Federal Communications Commission (FCC). The FCC engaged KPMG to prepare a study of utilization rates and probability of obtaining broadcast licenses from the FCC. The study will assist the FCC as part of a series of studies to determine if there has been previous discrimination by the agency or passive participation by the FCC in discrimination by the private sector.

This study measures license award rates by gender and race during periods of time when the FCC's stated policy was to provide preferences to minorities and women. During this period, the FCC awarded licenses under two regimes. First, the FCC would award a license to individual applicants (singletons) who were judged as qualified when only a single application was received. Second, if more than one applicant applied for the same license, then the FCC used Comparative Hearings, an administrative hearing process, to allocate broadcast licenses during the period from the 1940s until 1993.¹

In this report, KPMG presents its findings regarding participation rates and utilization rates for participants who were involved in Comparative Hearings from 1978-81 and 1989-93. A comparative hearing was the administrative process that the FCC used to allocate broadcast licenses during the period from the 1940s until 1993.² This report provides results developed from data collected and compiled on the participation and success of minorities and women in the FCC's comparative hearing award process for radio and TV licenses.³

¹ After comparative hearings, the FCC used auctions to award licenses. The first auction took place in 1999.

² While the FCC's Request for Proposal focused on utilization, and participation, we also measure disparity. We define utilization differently than it is defined in the FCC's RFP. The RFP describes utilization as the percentage of wins for each racial group, e.g. wins for group divided by the number of participants for group. While we make this calculation, we refer to it as a win rate rather than utilization rate. The standard literature on utilization refers to a utilization rate as the percentage of licenses won by each racial group. E.g. total wins for each group divided by total awards (for all groups combined). Participation (or availability) refers to the percentage of total availability that is comprised of each racial group. Disparity is a measure of utilization relative to availability. Typically in the literature on disparity studies, if the disparity ratio is substantively less than 1, say .8, then it is not unreasonable to suspect the possibility that discrimination may be present.

³ There are two companion pieces to this study that were prepared by KPMG. The first is "History of the Broadcast License Application Process". This report describes the license application and award process in great detail. The second companion study prepared by KPMG, "Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC", presents models of the license award process that attempt to determine how race, gender and other factors influenced the allocation of licenses awarded by the FCC.

The report is organized as follows.

Section II, *Comparative Hearings and Minority and Female Credit* provides a brief overview of the comparative hearing process and an introduction to minority and female credit.

Section III, *Data Collection*, outlines the efforts taken to collect these data.

Section IV, *Definitions of Win Rates, Availability and Disparity Ratios*, reviews some of the properties of these measures.

Section V, *Participation by Race and Gender in Comparative Hearings*, summarizes participation statistics by demographic group.

Section VI, *Win Rates and Disparity Ratios by Race and Gender in Comparative Hearings*, contains the central results of this memo. The section includes various formulations of win rates and disparity ratios.

Section VII *Win Rates and Disparity Ratios by Race and Gender, Based on Definition of Control*, considers win rates and disparity ratios based on a variety of definitions of which group controls an application.

Section VIII, *Level of Competition within Hearings*, looks at variation in the level of competition within hearings by examining the average number of parties per application and average number of applications per hearing across various demographic groups.

Appendix I provides the data collection form used to acquire these data.

Appendix II, *Standard Deviations*, discusses the impact of statistical uncertainty on each of the estimates presented in the previous sections.

II. Comparative Hearings and Minority and Female Credit⁴

Comparative Hearing Process

Comparative Hearings began soon after the FCC was created by the Communications Act of 1934 (the "Act").⁵ The Act granted the FCC the authority to regulate "communications by wire and radio so as to make available to all the people of the United States a rapid, efficient, nation-wide, and worldwide wire and radio communication service." This Act also empowers the FCC to issue broadcasting licenses "as public convenience, interest, and necessity requires."⁶

One landmark court case that was resolved in 1945 reinforced the importance of the comparative hearing process in awarding a broadcast license when there are multiple applicants. In *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Supreme Court of the United States held that:

Where the Federal Communications Commission has before it two applications for broadcasting permits which are mutually exclusive, it may not, in view of the provisions of the Act for a hearing where an application is not granted upon examination, exercise its statutory authority to grant an application upon examination without a hearing.

This decision set the legal precedent that a publicly distributed license must be assigned through a process that does not exclude competition for the license.

A comparative hearing was necessary when more than one applicant applied for the same broadcast license. In the event of multiple applicants, the FCC would hold a

⁴ This section is an abbreviated discussion. More detail is provided in the KPMG report, "History of the Broadcast License Application Process".

⁵ Communications Act of 1934, ch. 652, 48 Stat. 1064, 73rd Cong., 2d Sess. (1934) codified as amended at 47 U.S.C. §151 et seq. (1937).

⁶ Lawmakers anticipated the possibility that disputes might arise in the process of awarding broadcast licenses. Section 309 (a) of the Act grants authority to the FCC to assign any dispute over a license to a judicial hearing: If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such a decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for the hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

comparative hearing, a proceeding that was presided over by an Administrative Law Judge (ALJ). The purpose of the comparative hearing was to determine which applicant for a broadcast license is best qualified to hold the license.

In the period from 1970-1993, 2,437 licenses were awarded by comparative hearing while 6,178, or the majority of the licenses, were awarded to singleton applications because these applications were never challenged. Factors that the FCC described as determinative of license award were:

1. Diversification of control of the media of mass communications.
2. Full-time participation in station operation by owners.
3. Proposed program service.
4. Past broadcast record.
5. Efficient use of frequency.
6. Character of the applicants.
7. Other factors.

While the measures of success in acquiring a license that are presented in this report were influenced by these factors, we do not control for these factors in the measures that we present in this report. A companion report, "Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC" develops models of win rates by minority and gender status that control for some of these factors.

Minority and Gender Credit in Comparative Hearings

While the criteria set forth by the FCC in 1965 included diversification of control, initially the FCC refused to include the racial composition of an applicant group as a relevant factor in a comparative hearing. This position was challenged in 1965 by the Comint Corp applicant group in the comparative hearing for a TV broadcast license in Orlando, Florida.

In 1965, the D.C. Court of Appeals vacated the decision that awarded the TV license to Mid Florida Corp. and opened the license to competition. Eight applicants filed for ownership and the matter went to comparative hearing. In the comparative hearing, one of the applicants, Comint Corp., filed an application that included two black owners with a 14% shared interest. The proposed community for the license awarded had a 25% minority population. Comint argued that minority ownership should be given comparative credit on the basis of the 1965 statement on comparative hearings (1 F.C.C.2d 393 (1965)) which stated that the "two primary objectives toward which the process of comparison . . . are . . . the best practicable service to the public, and . . . a maximum diffusion of control of the media of mass communications." The FCC noted that while it:

"is sympathetic with Comint's argument and recognizes the validity of the goal of increased minority ownership of the media of mass

communications however, the Communications Act, like the Constitution, is color blind and therefore, in a comparative broadcast proceeding, which is governed by the Commission's Policy Statement . . . Black ownership cannot and should not be an independent comparative factor . . . rather, such ownership must be shown on the record to result in some public interest."

Comint challenged the FCC's refusal to explicitly consider race in the comparative hearing process and appealed the FCC's ruling to the DC Court of Appeals.

In the 1974 decision 495 F.2d 929 (D.C. Cir. 1974), the DC Court of Appeals reversed the result of the Mid-Florida comparative hearing. The Court held that comparative merit should be awarded to an applicant, two of whose stockholders, each owning approximately seven percent of the applicant's stock, were Black and would participate in the operation of the station. The Court pointed out that both of the Black principals were local residents of the community being applied for who had been active in advancing the interests of Black members of the community, and that 25 percent of the population of the area applied for were Black. It also noted that since the highest interest owned by any of the applicant's principals was ten percent, the two stockholders' individual and combined ownership was substantial. In addition, no Blacks were then participating in the ownership or management of any of the media of mass communications in that community. In these circumstances, the Court concluded that minority stock ownership is "a consideration relevant to a choice among applicants of broader community representation and practicable service to the public." (161 U.S. App. D.C. at 357, 495 F.2d at 937.) The court went on to comment:

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token but in good faith, as broadening community representation, gives a local minority group media entrepreneurship.... We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded. (TV 9 Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 418 U.S. 986 (1974)).

Accordingly, without recommending or requiring any quota system, the Court held that merit should be awarded for minority ownership where it is likely to increase the diversity of program content, especially of opinion and viewpoint. In a Supplemental Opinion, the Court emphasized that it was not holding that merit should be based on Black ownership alone, but rather in that case upon a meaningful combination of ownership and participation in station affairs which indicated that Black persons having

a substantial identification with minority rights would be able to translate their positions and their ownership stake into meaningful effect on this aspect of station programming. The Court also explained that "merit" meant only "favorable consideration," or a plus-factor, not a "preference," and that it was to be weighed along with other relevant factors in determining which applicant is to be awarded a preference. (161 U.S. App. D.C. at 361, 495 F.2d at 941.)

This decision set a new precedent for the incorporation of minority participation as a factor in the comparative hearing process.

Not long after the Court of Appeals decided that minority credit for integrated minority owners was appropriate, Administrative Law Judges began deciding cases on this basis. Additionally, administrative law judges at the FCC expanded on the TV 9 decision. In particular, the considerations applied to race in the *TV 9* decision were applied to gender in the *Rosemore* decision.

In *Rosemore Broadcasting, Co., Inc.*, (54 F.C.C. 2d 394, 418 (1975)), the FCC reasoned that integrated female ownership should be awarded credit in comparative hearings because women, like minorities, are "likely to increase diversity of content." The FCC went on to state that female participation in an application can be given credit when it "reflects broader community representation." Because two of the three individuals associated with *Rosemore Broadcasting Co.*'s application were female and these women planned on playing a significant role in the day-to-day operation of the broadcast station, the *Rosemore* application was enhanced in the FCC's eyes. The *Rosemore Broadcasting Company* went on to win the license in the comparative hearing.

Since the DC Court of Appeals in 1974 had set in place minority ownership and employment policies within comparative hearings the FCC and Administrative Law Judges had started awarding minority credit to applicants for broadcast licenses. However, in 1978 the FCC observed a "continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry" and subsequently issued "further Commission action" or Statement of Policy on Minority Ownership of Broadcasting Facilities (See 68 F.C.C.2d 979, 982). This statement formalized the use of minority merits in the comparative hearing process.

Metro Broadcasting, Inc.

Reviewing the FCC's policies under intermediate scrutiny, the Supreme Court held that the FCC's policy of minority ownership and employment in comparative hearings which gave enhancement credit for minority ownership and participation and the policy of allowing "distress sales" to FCC-approved minority-owned firms did not violate equal protection under the Fifth Amendment.

The Court reasoned:

Minority preference policies adopted by the Federal Communications Commission (FCC)-- do not violate the equal protection component of the Federal Constitution's Fifth Amendment, where Congress has enacted appropriations legislation (101 Stat 1329-31, 102 Stat 2216, and 103 Stat 1020) prohibiting the FCC from spending any appropriated funds to examine or change its minority ownership policies, because (1) the policies in question have been mandated by Congress; (2) the interest in enhancing broadcast diversity is, at the very least, an important governmental objective; and (3) the policies in question are substantially related to the achievement of the government's interest, since (a) both the FCC and Congress--whose joint determination must be given great weight--have concluded that there is a relationship between expanded minority ownership and greater broadcast diversity, (b) this judgment is based on extensive empirical evidence rather than on impermissible stereotyping, and (c) the policies are in other relevant respects substantially related to the goal of promoting broadcast diversity...

Gender Ownership Policies

Gainesville Media, Inc.

Approximately one month after the Commission issued Statement of Policy on Minority Ownership of Broadcasting Facilities, a Review Board hearing the Gainesville Media, Inc. case reanalyzed its decision regarding female ownership credit in comparative hearings. Initially, the board held that . . .

since there was no evidence in the record of the extent of female ownership in the mass media in Gainesville, we had no basis on which to conclude that such participation would achieve a public interest benefit. Upon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence regarding the ownership situations at other stations (see *Gainesville Media, Inc.*, 70 F.C.C.2d 143, 149 (Rev. Bd. 1978)).

Soon after the Gainesville decision, a review board clarified the justification and reasoning for female ownership policies. The Board concluded:

... merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a

consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks--women have not been excluded from the mainstream of society as have black people (see *Mid-Florida Television Corp.*, 70 F.C.C.2d 281, 326 (Rev. Bd. 1978), set aside on other grounds, 87 F.C.C.2d 203 (1981)).

This decision demonstrated that credit is applied for female participation in a broadcast license application, but that credit is not as significant as the credit applied for minority participation in a broadcast license application.

In 1993's *Bechtel* decision 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit Court found that the "continued application of the integration credit is arbitrary and capricious, and therefore unlawful." The court stated that the policy of extending additional credit to applicants who intended to personally manage and operate the broadcast stations was "without foundation." By invalidating the integration credit the court effectively eliminated gender and race ownership and employment policies associated with the integration credit. In 1994 the FCC suspended all active comparative hearings until an adequate resolution to the issues raised in *Bechtel* could be formulated.

The Telecommunications Act of 1996 eliminated the role of comparative hearings in the renewal of broadcast licenses. The 1994 suspension of the comparative hearing process effectively became permanent in 1997 when Congress mandated that the FCC utilize a competitive bidding process for the distribution of all future commercial broadcast license awards.⁷ The first auction associated with this mandate occurred in October of 1999 and generated (unofficially) about \$58 million from the distribution of 116 broadcast licenses and included several frozen license applications from the *Bechtel* ruling.

While minority ownership policies were not included in this auction process, first-time broadcasters and "small" broadcasters were accorded with auction credits to assist in their bidding.

After the suspension of the comparative hearing process due to the *Bechtel* decision, but before the implementation of the broadcast license auctions, two important court cases were decided which will impact the ability of the FCC to implement minority and female ownership and employment policies in the future.

⁷ See Omnibus Budget Reconciliation Act of 1993. Pursuant to this Act, the FCC received the authority to conduct auctions. Also note that competitive bidding was not required for broadcast license awards in which only one applicant expressed interest.

In the 1995 *Adarand* decision [515 U.S. 200 (1995)], the Supreme Court held that any federal program that uses racial or ethnic criteria as a basis for decision making must serve a compelling governmental interest such as remedying past discrimination and must be narrowly tailored to serve that interest. Furthermore, the court ruled that any racial distinctions employed by a local, state, or the federal government “must be analyzed by the reviewing court under strict scrutiny,” specifically overruling the standard of review used in *Metro Broadcasting*.

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court considered the distinctions made by local, state, and the federal government with respect to gender. In this case the court reaffirmed that these gender distinctions need only satisfy “intermediate scrutiny”. While the definition of intermediate scrutiny is somewhat vague, it is clear that intermediate scrutiny is a lower standard than strict scrutiny.

III. Data Collection

In order to develop statistics about the success of female, ethnic and minority and majority race groups in the comparative hearing process, KPMG collected data from FCC archives in Suitland Maryland during the period October, 1999 through March, 2000. Within the files on comparative hearing proceedings, maintained as paper files at the National Records Center, exist data on the declared minority status of parties to applications for broadcast licenses that were considered in the comparative hearing process. Also available are outcomes of the comparative hearings, i.e. a record of which applications have been awarded the licenses.

The data collection effort involved collecting information for 3063 parties involved in 775 applications in a sample of 230 comparative hearings over the periods 1978 to 1981, and 1989-1993. These periods were selected to satisfy a number of requirements.⁸ First, these were both periods when financial information was collected in the license

⁸ The FCC also requested an analysis of the period before minority preferences were in place. However, the cost of acquiring the necessary data prior to the minority and female preference period would have been prohibitive. KPMG examined the records in the FCC archives and determined that there was insufficient data on race of applicant. Therefore, analysis of this period would require KPMG to locate and survey license applicants using contact (name and address information) that was 20 or more years old. Based on a pilot survey of secondary market participants who sold a broadcast station between 1993 and 1999, KPMG estimated that only a 3.2 percent response rate could be achieved. Based on this experience and due to the fact that these contact information were approximately 20 years old, it was highly unlikely that KPMG would have been able to collect sufficient data for the pre-preference period; therefore this part of the study was terminated.

application.⁹ Second, during these periods, the FCC's stated policy was to provide credit for minority applicants.

KPMG retrieved documents from a random sample of the hearings that occurred during these two time periods. The universe of available hearings was made available to KPMG in two formats. For the period prior to 1983, the Administrative Law Judge Listing was used. This is a paper database. For the period after 1983 we relied upon the BAPS database. The BAPS database is an electronic database containing information on each comparative hearing that took place from the early 1980's up to today. Both data sources provide the following important information with regards to each hearing:

- unique hearing identifiers
- service
- ascension number.
- call sign
- start date for hearing
- end date for hearing

Tables 1 and 2 show the population of hearings and population of applications for radio and television hearings, broken into the two time periods.

Table 1.
Number of Hearings

Years	1978- 1981	1989- 1993	Total
All Licenses	421	142	563
Radio	286	134	420
AM	85	0	85
FM	201	134	335
TV	135	8	143

⁹ While financial information was not necessary for the construction of success ratios for groups in attaining broadcast licenses (utilization ratios), it was necessary for developing a regression model of the award process based on the factors and policies identified by the FCC as important to the award of a broadcast license. Although the selection of these time periods was guided by the requirements of the regression model, these periods are also useful for the construction of utilization ratios. Both of these time periods encompass the period when minority preference policies were used by the FCC in the award of broadcast licenses.

Table 2.
Number of Applications

Years	1978- 1981	1989- 1993	Total
All Licenses	1,064	595	1,659
Radio	716	583	1,299
AM	177	0	177
FM	539	583	1,122
TV	348	12	360

A sample of 230 comparative hearings was drawn from the population of hearings using stratified random sampling. The sample was stratified by service (AM, FM, and TV). This sample size was selected in an effort to balance the cost of data collection with the need to obtain a reasonable level of accuracy at various levels of disaggregation.

Once the sample was drawn, data collection personnel, who were primarily made up of personnel with legal or paralegal backgrounds, retrieved the files from the National Records Center in Suitland, MD. and collected the necessary data.¹⁰ The data items that were collected for the construction of the utilization ratios come principally from the application form 301. The items from this form are shown in appendix I.

IV. Definitions of Win Rates, Availability, and Disparity Ratios

Differing definitions for availability, utilization, and disparity ratios may offer a variety of insights; accordingly, we have used these data to develop a variety of estimates.¹¹ The differences in the estimates that appear in this report are mainly due to differing measures of availability, which is defined as the pool of applicants or potential applicants who are willing and able to compete for a broadcast license.

Before presenting results, this section describes the measures and how they are constructed. All of the win ratios we have developed are expressed as a ratio of a measure of success (or winning applicants) and a measure of participation (or applicants). A number of different ratios are presented. They are generally presented in the order of complexity of the calculation, with the simplest calculations presented

¹⁰ The data collected for the development of the utilization ratios was limited to a few key items. A more comprehensive data collection was performed for a subset of these hearings for the regression model.

¹¹ While we use the words participation and availability almost interchangeably in this document, there is a distinction. Participation refers to the people who have actually participated in the comparative hearing process. While we use this as a measure of availability, we should also point out that this measure could be biased downward if discrimination was responsible for inhibiting participation. More information on this issue is provided in section IV, "Definition of Win Rates, Availability".

first. While we present a number of measures, our preferred measure is called the “relative award rate” and it is presented in Table 13.

A key concept to keep in mind when reviewing these results is that there are different levels of aggregation that can be used to make calculations of success in acquiring licenses. This is due to the nature of the comparative hearing process and the fact that hearings are made up of multiple applications and applications can be made up of multiple parties of different race and gender who cooperate to bid on licenses.

The party is the lowest level for which measures of success can be calculated. Next there is the application level. Therefore, when we measure win rates, we can do it at the party level; i.e. how many parties of a particular group were involved as participants in winning applications. Or we can measure win rates at the application level, e.g. we can measure how many applications won where at least 1 party of a particular group was represented in the application or we could measure how many applications won when a particular group controlled more than 50% of the equity in the application. We present measures that use all of these definitions here.

There are strengths and weaknesses to all of the measures that we present. For example, looking at the data on a party basis, as we will do in tables 7 through 12, shows how a demographic group does overall but says nothing about the distribution of results for a group. If many parties from one demographic group were concentrated in only a few winning applications, it might appear as if the group were acquiring more licenses than it was actually acquiring because success would be attributed to a lot of parties who won few licenses. Also, accounting for equity control may be important because if that control is lacking, then what appears to be adequate participation may in fact not be meaningful participation. Finally, it is also important to distinguish win rates based on the value of licenses. It is conceivable that a group could be winning a reasonable number of licenses but if they were licenses of little value, this would not be a reasonable result. To account for this possibility, we have weighted the win rates by population of the area in which the licenses are awarded where population serves as a proxy for value of the license.¹²

Definitions for the measures that will appear in the tables that follow are provided below.

Relative win rate (party basis) = # winning parties in-group / # of parties in-group.

Relative win rate (equity basis) = equity of winning parties in group / equity of all parties in group

¹² While we have included a population weighted measure here, there are many other factors that we should control for. KPMG’s companion report performs this more rigorous analysis.

Absolute win rate = # winners in-group / total # of parties in all groups combined

% of winners = # of winners in group / total number of winners
(also known in literature as a utilization rate)

% participation = # of parties in group / total number of parties

Disparity ratio = % of winners / % participation

The relative award rate R is defined by the following equation:

$$R = \frac{1}{N} \sum_{i=1}^N (z_i - m_i) = \frac{1}{N} \sum_{i=1}^N z_i - \frac{1}{N} \sum_{i=1}^N m_i$$

where N is the number of hearings, i indexes hearings, z_i takes a value of one if the license in hearing i is awarded to a minority and zero if not, and m_i is the percentage of minority applicants in hearing i . The relative award rate is defined analogously for non-minorities, males, and females.

Winner take all relative win rate = #winning parties in group where equity is
controlling / #parties in group

It is informative to contrast calculated win ratios across different groups of applicants. Nevertheless, it is important to keep in mind that win rates cannot account for differences between groups that span multiple dimensions. For example, when contrasting a win rate for male applicants with a win rate for female applicants it is important to keep in mind that the ratio does not account for differences in other applicant characteristics (asset holdings for example) across the two groups. This suggests that it would be inappropriate to conclude that discrimination is taking place simply on the basis of win rates. Further analysis, which is presented in a companion study, using logistic regression models, discusses whether there are significant differences in award rates based on race or gender, while controlling for many factors that affect award rates.

The definition of the pool of "eligible participants" associated with various groups has frequently been a disputed issue in the calculation of availability ratios for studies of disparity. Typically, the broader the measure of the pool who are eligible to participate for each group, the greater the dispute because a broader pool is less likely to contain qualified and willing participants. At one extreme, the entire population of the group in question can be classified as eligible participants. But the entire population is not qualified or willing to participate in the process and therefore this is an inappropriate measure of eligibility. The Croson decision suggests a measure that contains only those

who are qualified, willing and able to participate.¹³ The measure of availability used in this study is narrower and more conservative than that in Croson. In the contracting context, availability is measured by counting all pre-qualified contractors, not just those who apply for a given contract. In licensing, there is no group of pre-qualified bidders, so the study uses those who actually applied for the given license.

Consistent with the conditions of Croson, we use a measure of the pool of eligible participants for each group. For the purpose of the win rates, availability, and disparity ratios presented here, the set of eligible participants associated with each group is limited to the set of individuals in that group that we actually observed participating in a comparative hearing.¹⁴

It is certainly conceivable that a broader measure of the pool of eligible participants could be more relevant. A broader and theoretically more appealing measure might include those who would have liked to apply, but failed to apply, because they may have been frustrated by the process or did not have equal access to the resources required to fulfill the application requirements.

We have not attempted to develop a methodology to measure the number of eligible participants for various groups using definitions of availability that are broader than the number who have actually participated in the hearing process. We believe that this line of inquiry is certainly warranted since the availability measure is an extremely important determinant of whether one can adequately measure the existence of disparity. If the measure of availability excludes potential applicants who have not been able to apply due to the existence of discrimination, then disparity measures that do not account for this possibility will be biased against a finding of discrimination. On the other hand if the measure of availability is over-inclusive so that it were to include those who are not qualified, willing and able to participate in the process, then disparity measures using such a measure of availability would be biased towards a finding of discrimination. The measures of availability that we use in this study are certainly not over-inclusive and are more likely to be under-inclusive.

Win rate and disparity measures that are based on a narrow definition of availability, such as the one we use here, result in a conditional measure of win rates or disparity. The disparity and availability ratios are conditional in the sense that we are testing only the second of two dimensions of the process. The first dimension of the hearing process relates to who is able to participate in a hearing; i.e. who is able to apply. The second dimension relates to who wins given that they have passed the first hurdle, i.e. been able

¹³ 488 U.S. 469, 109 S.Ct. 706; *City of Richmond v. J.A. Croson Company* (1989) U.S. Supreme Court

¹⁴ The disparity measure that we calculate is widely used by state and local governments when calculating disparity in the award of public contracts. This measure is not necessarily the best measure for the purpose of measuring disparity in the award of licenses, which unlike recurring public contracts, are only awarded on a one-time basis. Our preferred measure is the relative award rate that is presented in Table 13.

to participate and have been included in the application and hearing process. Our analysis only considers the second of these two dimensions. If minority or female participation has been affected by impediments such as inadequate access to capital, due to discrimination, the disparity measures represented here would not capture this dimension of the licensing process.

We do note, as the following data will suggest, that minority participation in broadcasting is very low relative to minority representation in the general population. Table 3 shows the minority participation in broadcasting and minority shares of the U.S. population.

Table 3.
Participation in Comparative Hearings and Percent of U.S. Population in 1990*

	Percent of Parties in Hearings (1)	Percent of U.S. Population (2)
Total Minority	8.9%	23.8%
Black	3.4%	12.2%
Asian	.4%	2.7%
Hispanic	3.9%	8.7%
American Indian, Eskimo, Aleut	.4%	.7%
White	91.1%	76.2%
Male	79.3%	48.7%
Female	20.7%	51.3%

*Notes: (1) Detailed race and ethnic categories do not sum to total minority for the Percent of parties in hearings, due to nonreporting of this level of detail for a small portion of the minority applicants (.8% fail to report the level of detail about their minority status). (2) For the percent of U.S. population, there is slight overlap in the figure for black and Hispanic because black includes those blacks of Hispanic origin (about .5% of the 12.2% of blacks are of Hispanic origin).

There is certainly a large difference between the minority share of participants in comparative hearings and the minority share of the U.S. population.

Note that during the period that we are performing this analysis, the FCC's stated policy was to provide credit for minority participation in applications. Therefore, when we present win rates and disparity rates, one would expect that if the FCC's policy has been effective, there would be greater minority participation (and probably greater utilization) than in the absence of this policy. We can assume then that the level of female and minority participation, which is low relative to female and minority representation in the population, would have been even lower still in the absence of the FCC's stated policy.¹⁵

V. Participation by Race and Gender in Comparative Hearings

¹⁵ Without collecting data from the period before preferences were in place, it is not apparent how much additional minority and female participation has resulted from the FCC's stated policy of providing credit for minority and female participation in applications. However, it has been established that ownership of broadcast licenses was as low as 10 out of 7,500 radio stations and none of the more than 1,000 television stations held in 1971 (see *TV 9 Inc. v. FCC*, 161 U.S. App. D.C. 349, 347, n. 28, 495 F.2d 929, 937 n. 28 (1973)).